

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 6, 2007 Session

JOHNNY DAVID HILL SR. v. CONNIE LOUISE HILL

Appeal from the Chancery Court for Lincoln County
No. 00012454 J.B. Cox, Chancellor

No. M2007-00471-COA-R3-CV - Filed April 23, 2008

This appeal involves legal separation and divorce. The parties had a long-term marriage. The husband worked as a truck driver; the parties owned a trucking company. At various times, the wife worked as a bookkeeper for several companies, but had primarily been a homemaker raising the parties' two children, now adults. The marital estate consisted of real estate, the trucking company, and personal property. Both parties had significant health problems, and both had engaged in extramarital affairs. After the husband's most recent affair, the wife told the husband to leave. He did so, and then filed a complaint for divorce. The wife answered and counterclaimed for divorce, but later amended her counterclaim to seek legal separation instead of divorce. She did so because her health insurance and prescription medication would be prohibitively expensive if she were not covered by the husband's insurance. After a trial, the trial court ordered legal separation, but indicated that it contemplated awarding a divorce once the wife qualified for federal healthcare benefits. The court also divided the marital estate, awarding approximately sixty percent to the wife, and ordered the husband to pay alimony in futuro. The husband appeals, asserting that the trial court erred in not granting a divorce, in making an inequitable division of the marital estate, and in ordering alimony in futuro. We reverse the trial court's decision to order legal separation. In light of the wife's health insurance needs after the divorce takes effect, we vacate the property division and award of alimony, and remand for reconsideration of those issues.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part;
Reversed in Part; and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and JON KERRY BLACKWOOD, SR. J., joined.

Randy Hillhouse, Lawrenceburg, Tennessee, for the Plaintiff/Appellant, Johnny David Hill

Barbara G. Medley, Lewisburg, Tennessee, for the Defendant/Appellee, Connie Sue Hill

OPINION

Plaintiff/Appellant Johnny David Hill Sr. (“Husband”) and Defendant/Appellee Connie Louise Hill (“Wife”) were married on October 7, 1963. Two children were born of the marriage, both of whom are now self-supporting adults. At the time the complaint for divorce was filed, Husband was 61 years old and Wife was 59.

Husband has a high school education. After graduating from high school in 1962, he went to work on his family’s dairy farm. After the dairy farm declared bankruptcy in 1984, Husband began working as a truck driver, and has been driving a truck since that time. The parties’ tax returns indicate that Husband’s gross income was \$156,763 in 2001, \$158,950 in 2002, \$165,764 in 2003, \$199,311 in 2004, and \$217,212 in 2005.

When the parties married, Wife was a senior in high school. She did not graduate from high school, but later earned her G.E.D. Wife worked for a short time as a bookkeeper, but quit to become a homemaker when the parties’ first child was born in 1964. She kept the books for a feed store, which the parties owned, between 1974 and 1977, but then returned to being a homemaker. Around 1981, Wife worked as a bookkeeper for a construction company for approximately eighteen months. Beginning in 1983, Wife kept the books for a bottling company, until the bottling plant closed in 1991. After that, Wife did not work outside the home. For some time, the parties attempted to raise ostriches on their property, a venture in which Wife took on significant responsibility, but this business failed. At the time the parties filed for divorce, Wife’s primary responsibility was caring for her mother and her grandchildren.

The parties’ marriage was peppered with extramarital affairs and heated, sometimes violent confrontations. Husband’s first affair lasted approximately ten years. During this time, Wife engaged in an extramarital relationship with the owner of the construction company for which she was the bookkeeper; this relationship, however, lasted only a matter of months. When Husband ended the first extramarital relationship and embarked on another, Wife was provoked into several angry clashes with him. In one, Wife threatened Husband with a gun. In another, she accosted him from the sleeping compartment of his truck as he was driving on the highway. Finally, Wife angrily woke Husband in the middle of the night and told him to get his clothes and get out of the house. He did so, and the parties remained separated after that.

On February 21, 2006, Husband filed a complaint for divorce, asserting irreconcilable differences and inappropriate marital conduct. Wife filed an answer and a counterclaim seeking divorce. She denied that she was guilty of inappropriate marital conduct, alleged that Husband had engaged in inappropriate marital conduct, and also alleged irreconcilable differences. Wife sought temporary and permanent spousal support.

On November 3, 2006, after Husband replied to Wife’s counterclaim, Wife filed an amended counterclaim. In the amended counterclaim, Wife asserted that she was covered under Husband’s health insurance policy, and that she would no longer be covered in the event of a divorce. She maintained that this lack of coverage would leave her solely responsible for a “very large

prescription bill.” Accordingly, Wife amended her counterclaim to delete her request for a divorce, and instead to seek a decree of separate maintenance, or, in the alternative, legal separation.¹

Prior to trial, Husband filed a sworn statement of income and expenses indicating that he had net monthly income of \$16,358.33 and monthly personal and business expenses of \$11,288.99. Wife’s sworn statement of income and expenses stated that she had no monthly income, but had monthly expenses of \$4,662.32. During the parties’ separation, Husband paid Wife \$4,000 per month in temporary support.

A trial was held on November 8, 2006. Husband and Wife were the only witnesses.

The trial court heard testimony from both parties regarding their real property. Husband testified that the parties owned four pieces of real property. The parties’ primary residence during the marriage was located on Hancock Road in Fayetteville, Tennessee, appraised at a value of \$250,000. They also owned property on Simmons Road in Fayetteville, appraised at \$37,000. At the time of trial, Husband was living in a trailer on this property. In 2005, the parties purchased a piece of property located on Old Camargo Road in Fayetteville, appraised at a value of \$84,000. Finally, Husband testified that the parties owned a piece of property located on Lancer Lane, also in Fayetteville. Wife’s mother, Louise Hudson, deeded this property to the parties on December 29, 2005, reserving a life estate for herself. As consideration for the deed to the Lancer Lane property, Husband and Wife signed a promissory note, promising to pay Wife’s mother \$47,623.68 in two installments. These payments were apparently not made, and Wife’s mother later signed documents purporting to forgive the debt reflected in the promissory note.

Wife testified that the transfer of the deed to her mother’s Lancer Lane property was only half of a property transfer agreement between the parties. She testified that Husband’s mother, like her mother, was supposed to deed her home to Husband and Wife and reserve a life estate for herself. Wife testified, however, that Husband did not go through with their agreement. On cross-examination, Husband acknowledged that the parties had discussed the possibility of having his mother transfer title to her home to the parties as well, but said that they abandoned the idea because of potential legal problems.

Wife asked the trial court not to include the Lancer Lane property in the marital estate. Husband wanted the court to consider the Lancer Lane property as marital property, but asserted that he should be awarded the Simmons Road property and the Old Camargo property in the property division.

The trial court also heard testimony about the parties’ health problems. Husband testified that he had chronic back problems, including a deteriorated disc in his lower back, and said that he

¹Husband filed a motion to dismiss Wife’s amended counterclaim, arguing that it was improperly filed under Rule 15.01 of the Tennessee Rules of Civil Procedure because it was filed after Husband had already responded to the original counterclaim and because Wife sought neither Husband’s consent nor leave of court to file it. The record does not include a ruling on Husband’s motion to dismiss the amended counterclaim, but the trial appeared to proceed on the understanding that Wife had been permitted to file the amended counterclaim. Therefore, we do the same in this appeal.

was taking ten to twelve aspirin per day to deal with his back pain. He also testified that he had high blood pressure. If his blood pressure got any higher, Husband stated, the Department of Transportation would force him to cut his truck driving time or could even revoke his driving certificate altogether. In addition, Husband has type two diabetes. Because of his health problems, Husband expressed a desire to reduce his truck driving time significantly in the coming year, but conceded that such a reduction would cut his net income to \$45,000 per year. Husband acknowledged that Wife was covered under this health insurance policy, and that if the parties divorced, she would no longer be covered under the policy.

Wife testified about her health problems as well. She testified that she suffers from arthritis, ulcers, chronic obstructive pulmonary disease, high cholesterol, hypothyroidism, and a nervous condition. She entered into evidence a list of her monthly prescriptions, which cost \$520.82 per month. Under Husband's health insurance, she said, she paid \$200 for these medications and the health insurance paid the balance.

Wife asserted at trial that a legal separation would be more appropriate than a divorce because a divorce would result in the termination of her health insurance coverage. She requested a legal separation until she was old enough to qualify for Medicare so that she would not have to pay for her medications out-of-pocket. Wife said that, in the event the court granted a divorce, she wanted Husband to pay for a health insurance policy for her, and entered into evidence a preliminary quote outlining the cost of available policies.² Husband testified that he was opposed to a legal separation. He stated, "I want to slow down. I want to semi-retire. I can't do a legal separation." Husband offered, however, to pay for Wife's health insurance until she qualified for Medicare.

After the close of proof, the trial court took the case under advisement.³ It issued a memorandum opinion on January 8, 2007. In the memorandum opinion, the trial court found that the parties owned four pieces of real property: (1) the Simmons Road property at a value of \$37,000, (2) the Old Camargo Road property at a value of \$84,000, (3) the Hancock Road property at a value of \$250,000, and (4) the Lancer Lane property at a value of \$90,000. As to the Lancer Lane property, the trial court found that the life estate reserved by Wife's mother had a value of \$34,500. The court also found that the parties had agreed on a gifting plan, under which Husband's mother was supposed deed the title to her home to the parties, but that Husband did not follow through with the agreed plan.

The trial court next found that Husband's 2005 income was \$108,845, and that he had an individual retirement account worth \$37,576.35 and a Peterbilt tractor truck worth \$37,500. The trial

² According to the quote, a policy with a \$300 deductible would cost \$1,019 per month; with a \$500 deductible, the monthly rate would be \$853; with a \$1,000 deductible, the monthly rate would be \$721.

³ While the trial court had the case under advisement, Wife filed a motion to consider additional evidence. She sought to introduce into evidence a letter from the insurance company that had provided preliminary quotes on insurance plans available to her. The letter, which was attached to the motion, states that the company denied coverage for Wife. The trial court never ruled on Wife's motion, and the trial court's memorandum opinion does not indicate that the court considered the letter from the insurance company.

court observed that the parties had a savings account and a checking account, but made no findings as to the value of those accounts. Likewise, there was no finding on the value of the parties' other personal property.

The trial court found that Husband was guilty of inappropriate marital conduct under Tennessee Code Annotated § 36-4-101(11). Instead of granting Wife a divorce, the trial court ordered legal separation pursuant to Tennessee Code Annotated § 36-4-102(b). The trial court commented that it did not contemplate a reconciliation, but indicated that it would grant the parties a divorce once Wife became eligible for federal Medicare benefits.⁴

The trial court then addressed the division of marital property. Husband was awarded the Simmons Road property, the Old Camargo Road property, his trucking business, the Peterbilt tractor truck, his automobiles, his entire retirement account, the parties' savings account, and various articles of personal property. Wife was awarded the Hancock Road property, the Lancer Lane property, her automobile, the parties' checking account, and other articles of personal property. The trial court declined to award Husband any interest in the Lancer Lane property, based on its finding that Husband failed to follow through on the agreed plan to have his mother transfer her home to the parties and reserve a life estate. Wife was allocated the indebtedness on her automobile and the mortgage debt on the Hancock Road property. Husband was allocated the debt on his automobile, as well as a line of credit associated with his trucking business.

Finally, the trial court addressed the issue of spousal support. The trial court found that Wife was incapable of rehabilitation, and that an award of alimony in futuro was appropriate. It based this decision on the duration of the marriage, the parties' relative earning capacities, and Wife's age and health. Husband was ordered to pay Wife permanent periodic alimony in the amount of \$2,000 per month "until her death, or cohabitation during the pendency of this legal separation." The trial court found that both parties had the ability to pay their own legal fees.

The final order of legal separation was entered on February 7, 2007. Husband filed his notice of appeal on February 26, 2007.

On appeal, Husband argues that the trial court erred by (1) refusing to grant an absolute divorce, (2) awarding Wife a disproportionate share of the marital estate, and (3) by awarding Wife \$2,000 per month in alimony in futuro.

Because this case was tried without a jury, we review the findings of fact *de novo* on the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d); **Berryhill v. Rhodes**, 21 S.W.3d 188, 190 (Tenn. 2000). We review the trial court's legal conclusions *de novo* with no such presumption. **Taylor v. Fezell**, 158 S.W.3d 352, 357 (Tenn. 2005). Discretionary decisions are reviewed to determine whether the evidence in the record supports the factual basis of the trial court's decision,

⁴Wife was nearing her 61st birthday at the time of the final order of legal separation. Assuming she would become eligible for Medicare benefits at age 65, the parties would be legally separated for four years.

whether the trial court correctly applied the relevant legal principles, and whether the trial court's decision falls "within the range of acceptable alternatives." *BIF, a Div. of Gen. Signals Controls, Inc. v. Serv. Constr. Co., Inc.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988).

Husband first argues that the trial court erred by refusing to grant the parties a divorce. He asserts that the trial court made no findings that would justify separation, and contends that the trial court's finding that reconciliation was unlikely militated against its decision to grant Wife's request for legal separation as opposed to divorce. Accordingly, Husband seeks a reversal of the trial court's decision and asks this court to declare the parties divorced.

Under Tennessee law, trial courts are given a certain amount of discretion in deciding whether to grant the remedy of divorce or the remedy of legal separation. *See Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *8 (Tenn. Ct. App. May 13, 2003). The range of this discretion is outlined in Tennessee Code Annotated §§ 36-4-102(b),⁵ 36-4-119,⁶ and 36-4-101(a)(15).⁷ *Id.* Under these statutes, important limitations are placed on the trial court's discretion that "cannot be disregarded" by a reviewing court. *Id.* For example, legal separation may be granted only "for a limited time." T.C.A. § 36-4-119 (2005). Also, if married parties have not reconciled within two years after entry of an order of legal separation, the failure to reconcile can be considered grounds for divorce. T.C.A. §§ 36-4-101(a)(15) (2005 & Supp. 2007), 36-4-102(b) (2005). Thus, the duration of legal separation is generally "set at two years." *Ford v. Ford*, No. 13, 1989 WL 51510, at *3 (Tenn. Ct. App. May 18, 1989) (citing T.C.A. § 36-4-102(b) (1984)).

Moreover, legal separation is appropriate primarily where the trial court finds that reconciliation between the parties is possible. In these circumstances, legal separation—as opposed to divorce—may be appropriate in order to diminish the negative effects of divorce on public welfare:

⁵Section 36-4-102(b) states, "If the other party specifically objects to legal separation, the court may, after a hearing, grant an order of legal separation, notwithstanding such objections if grounds are established pursuant to § 36-4-101." T.C.A. 36-4-102(b) (2005).

⁶Section 36-4-119 states:

If, upon hearing the cause, the court is satisfied that the complainant is entitled to relief, it may be granted either by pronouncing the marriage void from the beginning, or by dissolving it forever and freeing each party from the obligations thereof, or by a separation for a *limited* time.

T.C.A. § 36-4-119 (2005) (emphasis added).

⁷Section 36-4-101(a)(15) states, as a cause for divorce, "For a continuous period of two (2) or more years that commenced prior to or after April 18, 1985, both parties have lived in separate residences, have not cohabited as man and wife during such period, and there are no minor children of the parties." T.C.A. § 36-4-101(a)(15) (2005 & Supp. 2007).

The prospects of reconciliation are a major factor guiding the court's discretionary determination regarding ordering legal separation or an absolute divorce. The trial judge may grant legal separation and decline to distribute the marital property where the possibility of reconciliation is promising. In contrast, divorce and property division is generally considered preferable where the prospects of reconciliation are poor or nil and the marital relationship has ended.

Haas v. Haas, No. 99D-3509, 2002 WL 1579717, at *2 (Tenn. Ct. App. July 18, 2002). If reconciliation is impossible, “[l]egal separation would merely prolong a bad situation that society has no interest in preserving . . .” *Id.* at *3 (citing *Lingner v. Lingner*, 56 S.W.2d 749, 752 (Tenn. 1933)); *see also McCray v. McCray*, No. 01-A-01-9612-CH-00553, 1997 WL 431181, *2 (Tenn. Ct. App. Aug. 1, 1997) (“We do not believe that when reconciliation between the parties is no longer possible either party is entitled to exercise a veto over the question of divorce.”). The *Edmisten* court stated that “we must take into consideration ‘the mischiefs arising from the turning out into the world, in enforced celibacy, persons who are neither married nor unmarried.’” *Edmisten*, 2003 WL 21077990, at *8 (quoting *Burlage v. Burlage*, 32 N.W. 866, 867 (Mich. 1887)).

In this case, the trial court stated that there was little chance of reconciliation, but ordered separation instead of divorce so that Wife could remain covered by Husband's health insurance policy until she qualifies for Medicare. At the time of trial, Wife was 61 years old, and would presumably qualify for Medicare at age 65. Thus, the parties would be separated for four years. Obviously, this is in excess of the general two-year limitation on legal separation. *See Ford*, 1989 WL 5150, at *3.

Moreover, it is undisputed, and the trial court found, that there is little hope that these parties will reconcile. The trial court's decision to grant a legal separation instead of divorce was driven by the financial benefit of keeping Wife covered under Husband's health insurance policy. However, purely financial reasons are simply not sufficient to justify an award of legal separation instead of divorce. As our Supreme Court has stated:

We fully recognize that considerations of public policy demand that the institution of marriage be sheltered and safeguarded. But there is an obverse side to the coin of public policy and consideration must be given to the fact that society is ill-served by a legally commanded continuance of a marriage which exists in name only.

Farrar v. Farrar, 553 S.W.2d 741, 744-45 (Tenn. 1977). Unfortunately, this Court is regularly faced with parties in dire financial circumstances, who can ill afford to be divorced. Financial reasons alone, however, will rarely justify “a legally commanded continuation of a marriage which exists in name only.” *Id.*

Accordingly, we must reverse the trial court's order of legal separation. Because the trial court found that Husband, and not Wife, engaged in inappropriate marital conduct, we cannot grant a divorce in favor of Husband. Wife amended her counterclaim to seek legal separation instead of divorce, so we do not grant the divorce to her. Instead, we declare the parties divorced pursuant to Tennessee Code Annotated § 36-4-129(b) and modify the trial court's judgment accordingly.

Husband also appeals the trial court's division of marital property,⁸ and its award of alimony in futuro of \$2,000 per month to Wife. Wife argues that the trial court erred in declining her request for \$4,000 per month in alimony in futuro.

In reviewing the trial court's division of the marital estate, we "defer to the trial judge's decision unless it is inconsistent with the factors in [section] 36-4-121(c) or is not supported by a preponderance of the evidence." *Dortch v. Dortch*, No. M1999-02053-COA-R3-CV, 2001 WL 799752, *2 (Tenn. Ct. App. July 17, 2001) (citing *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994); *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 622 (Tenn. Ct. App. 1989); *Hardin v. Hardin*, 689 S.W.2d 152, 154 (Tenn. Ct. App. 1983)).

The evidence supports the trial court's finding that Husband has substantially greater earning power than Wife. Disparity in earning power is a relevant consideration when dividing marital property. *See* T.C.A. § 36-4-121(c)(4), (8); *Dortch*, 2001 WL 799752, at *2. We find no error in the trial court's decision to award Wife a greater portion of the marital estate based on this disparity in earning power. *See Crabtree v. Crabtree*, 16 S.W.3d 356, 361 n.4 (Tenn. 2000) ("In cases in which there is a disparity between the relative earning capacities of the parties, a trial court also may consider adjusting the award of marital assets to assist the disadvantaged spouse.").

Husband argues that the trial court committed error in awarding Wife alimony in futuro, because Wife was awarded a greater share of the marital estate, because Wife could go back to work as a bookkeeper, and because Husband plans to spend less time working in the near future. Wife contends that her age, educational background, and lack of work experience support the trial court's finding that she is not capable of rehabilitation. She argues that the length of the marriage—forty-three years—and Husband's ability to pay her \$4,000 during the pendency of the divorce justify an upward modification of the alimony award.

The trial court is afforded wide discretion regarding the award of spousal support, and we will reverse the court's findings only upon determining that such discretion "has manifestly been abused." *Hanover v. Hanover*, 775 S.W.2d 612, 617 (Tenn. Ct. App. 1989). Alimony in futuro is appropriate when the disadvantaged spouse is not capable of rehabilitation. *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). The need of the disadvantaged spouse and the ability to pay of the obligor spouse are "the two most important factors" to consider in setting spousal support. *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002).

Here, the evidence supports the trial court's finding that Wife is not capable of rehabilitation and, as noted above, its finding on the disparity in earning capacity between Husband and Wife. The duration of the marriage, the parties' relative earning capacities, and Wife's age and health are all

⁸Husband asserts that he was only awarded thirty-four percent of the marital estate. This figure miscalculates the value of the marital estate, however, because it does not deduct the value of Wife's mother's life estate in the Lance Lane property. Making this deduction, and taking as correct the property values found at trial, we find that Wife was awarded \$305,500—consisting of the Lancer Lane property and the Hancock Road property—and Husband was awarded \$200,076.35—consisting of the Simmons Road property, Old Camargo Road property, retirement account, his automobile, and the Peterbilt truck—from an estate valued at \$505,576.35.

appropriate and relevant considerations. *See* T.C.A. § 36-4-121(i)(1), (3), (4), (5) (2005). There is also sufficient evidence to support the trial court's finding that Husband has the ability to pay Wife \$2,000 per month. *See Robertson*, 76 S.W.3d at 342. We find no abuse of discretion in the trial court's award of spousal support. *See BIF*, 1988 WL 72409, at *3.

However, we must remand the case to the trial court for reconsideration of both the division of marital property and the award of spousal support, in light of our decision to reverse the grant of legal separation and declare the parties divorced. It is undisputed that a consequence of divorce in this case is removal of Wife from coverage under Husband's health insurance. Until Wife qualifies for Medicare coverage, she will need health insurance and, in light of her health challenges and her age, such health insurance will likely be expensive. This increases Wife's need, and will likely require either a modification of the division of marital property and/or an upward modification of the award of alimony, or some other method to give Wife the means to pay for her health insurance. On remand, the trial court may, in its discretion, take additional proof on any relevant issue. In addition, on the issue of Wife's alimony, the trial court should consider the reduction in Wife's need once she qualifies for Social Security benefits and Medicare.

In sum, we modify the trial court's judgment to reverse the award of legal separation and instead declare the parties divorced. Due to the resulting increase in Wife's need, we vacate the division of marital property and the award of alimony in futuro and remand the cause for further proceedings. All other issues raised on appeal are pretermitted.

The decision of the trial court is reversed, modified, and vacated as set forth above, and the cause is remanded for further proceedings not inconsistent with this Opinion. Costs are assessed one-half against Appellant Johnny David Hill, Sr. and his surety, and one-half against Appellee Connie Sue Hill, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE